169

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No. 10-82

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

RICARDO GONZALEZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

Arizona v. *Gant*, 129 S. Ct. 1710 (2009) 2, 10
Briscoe v. *State*, No. 2010-4 (Md.) (oral argument scheduled for Sept. 1, 2010) 8
Brown v. *State*, 24 So. 3d 671 (Fla. Ct. App. 2009), review denied, No. SC10-104, 2010 WL 2770221 (Fla. June 18, 2010) 8
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988) 4
Danforth v. *Minnesota*, 552 U.S. 264 (2008) 11
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 11
Herring v. *United States*, 129 S. Ct. 695 (2009) 2, 11
Hudson v. *Michigan*, 547 U.S. 586 (2006) 2
Illinois v. *Gates*, 462 U.S. 213, 223 (1983) 11
Illinois v. *Krull*, 480 U.S. 340 (1987) 11
Monsanto Co. v. *Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) 4
People v. *Branner*, 103 Cal. Rptr. 3d 256 (Ct. App. 2009), review granted, 227 P.3d 342 (Cal. 2010) 7
People v. *Henry*, 110 Cal. Rptr. 3d 85 (Ct. App. 2010), review granted, No. S183964, 2010 WL 3276583 (Cal. Aug. 11, 2010) 7
State v. *Daniel*, No. 101622 (Kan.) (argued Dec. 8, 2009) 7
State v. *Dearborn*, ___ N.W.2d ___, No. 2007AP1894-CR, 2010 WL 2773536 (Wis. July 15, 2010) 7
State v. *Frederick*, ___ P.3d ___, No. 36493, 2010 WL 2901802 (Idaho July 27, 2010) 7
State v. *Herrick*, 588 N.W.2d 847 (N.D. 1999) 9

Cases—Continued: Page

State v. *Hicks*, ___ S.W.3d ___, No. SD30266, 2010 WL 3280092 (Mo. Ct. App. Aug. 20, 2010), review pending (Mo. transferred Aug. 20, 2010) 8

State v. *Johnson*, ___ S.W.3d ___, No. WD70167, 2010 WL 2730593 (July 13, 2010), motion for reh'g pending (Mo. Ct. App. filed July 19, 2010) 8

State v. *Karson*, ___ P.3d ___, No. 101263, 2010 WL 2977223 (Kan. Ct. App. July 30, 2010) 7

State v. *Ward*, 604 N.W.2d 517 (Wis. 2000) 9

UPS, Inc. v. *Mitchell*, 451 U.S. 56 (1981) 4

United States v. *Allison*, 637 F. Supp. 2d 657 (S.D. Iowa 2009) 6

United States v. *Davis*, 598 F.3d 1259 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010) 5

United States v. *Gray*, No. 4:09-cr-3089, 2009 WL 4739740 (D. Neb. Dec. 7, 2009) 6

United States v. *Hatter*, 532 U.S. 557 (2001) 4

United States v. *Jackson*, 825 F.2d 853 (5th Cir. 1987), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988) 9

United States v. *Leon*, 468 U.S. 897 (1984) 2, 11

United States v. *McCane*, 573 F.3d 1037 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010) 5

United States v. *Mendoza*, 464 U.S. 154 (1984) 4

United States v. *Salamasina*, ___ F.3d ___, No. 09-2186, 2010 WL 3062007 (8th Cir. Aug. 6, 2010) 6

United States v. *Scroggins*, No. 4:09-cr-60, 2010 WL 750057 (W.D. Mo. Feb. 26, 2010) 6

Cases—Continued: Page

United States v. *Shakir*, ___ F.3d ___, No. 09-2665, 2010 WL 3122808 (3d Cir. Aug. 10, 2010) 6

United States v. *Tschacher*, No. 4:09-cr-3025, 2010 WL 2696154 (D. Neb. July 1, 2010) 6

Valesquez v. *Commonwealth*, ___ S.W.3d ___, No. 2009-CA-147, 2010 WL 567325 (Ky. Ct. App. 2010), motion for review pending, No. 2010-SC-193 (Ky. filed Mar. 22, 2010) 8

Constitution and rules:

U.S. Const. Amend. IV 3, 4

Kan. Sup. Ct. R. 8.03(a)(1) 8

Mo. Sup. Ct. R.:

Rule 30.27 8

Rule 83.03 8

Miscellaneous:

State v. *Daniel*, No. 101622 (Kan.), oral argument audio, http://www.kscourts.org/kansas-courts/supreme-court/archive/archived-arguments-December-2009.asp 7

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The Ninth Circuit in this case—over the dissent of seven judges (Pet. App. 33a-52a)—held that the good-faith exception to the exclusionary rule does not apply when law-enforcement officers conduct a search in objectively reasonable reliance on appellate precedent that, at the time of the search, upheld such searches as lawful. There is no question that the officers here reasonably followed longstanding appellate decisions: Even the Ninth Circuit in this very case initially held the search in question to be a "lawful search incident to [an] arrest." Pet. App. 8a; see *id.* at 24a (B. Fletcher, J., concurring in denial of rehearing en banc). In such circumstances, officers have acted precisely as they should by carefully following governing court decisions that specify the parameters of a lawful search. Even where, as here, those decisions are later overturned, the judicial

remedy of suppression cannot meaningfully deter unlawful police misconduct because no reasonable officer would have done anything differently at the time of the search. The good-faith exception therefore renders suppression wholly unwarranted, even though we now know that the search of respondent's vehicle in 2006 was unlawful under *Arizona* v. *Gant*, 129 S. Ct. 1710 (2009). Pet. 11-17.

Respondent does not contend that suppression would have any deterrent effect. Instead, his single reference to "deterren[ce]" asserts that the exclusionary rule must apply even if it would have "little deterrent value." Br. in Opp. (Opp.) 21. That position, like the Ninth Circuit's holding, cannot be squared with this Court's precedents, which make clear that exclusion is an "extreme sanction" that has "always been [the Court's] last resort," *Herring* v. *United States*, 129 S. Ct. 695, 700 (2009) (quoting *United States* v. *Leon*, 468 U.S. 897, 916 (1984), and *Hudson* v. *Michigan*, 547 U.S. 586, 591 (2006)), and "has *never* been applied except 'where its deterrence benefits outweigh its 'substantial social costs.'" *Hudson*, 547 U.S. at 594 (emphasis added) (citation omitted); see Pet. 11-12.

The Fifth, Tenth, and Eleventh Circuits and several state supreme courts have thus rejected the Ninth Circuit's approach by holding that the good-faith exception applies where, as here, a search is conducted in objectively reasonable reliance on appellate precedent that is overturned after the search is conducted. Pet. 17-19 & n.4; pp. 6-7, *infra* (discussing recent decisions). This Court's review is warranted to resolve an entrenched division of authority on that important and recurring question.

Respondent acknowledges the division of authority. Compare Opp. 9 with Opp. 22. He nevertheless contends that review is unwarranted because, he argues, the government should be estopped from relying on the good-faith exception (Opp. 10-11), the question presented does not reflect an enduring problem (Opp. 11-15), and the Ninth Circuit was correct (Opp. 15-25). None of those contentions provides a reason to deny review.

1. Respondent's leading arguments against review based on "waiver, law of the case, and collateral estoppel" (Opp. 10-11) are meritless. Respondent appears to contend that the government waived any objection to suppression in its February 2009 brief responding to respondent's petition for a writ of certiorari. But, as respondent admits, "[t]he only issue raised [in the petition] was the constitutionality of the vehicle search." Resp. Supp. C.A. Br. 3. The government thus suggested that this Court hold the petition "pending the decision in *Arizona* v. *Gant*" because "*Gant* will likely shed considerable light on the proper resolution of this case." U.S. Br. at 4, *Quintana* v. *United States*, 129 S. Ct. 2156 (2009) (No. 08-7096). That statement simply acknowledged that *Gant* might drive the proper resolution of respondent's Fourth Amendment claim (which it did, Pet. 6-7), not that *Gant* would resolve the proper remedy for a violation. Those distinct questions of Fourth Amendment right and remedy have long been regarded as separate issues by this Court. Pet. 15 (citing cases). This Court accordingly remanded to the Ninth Circuit for "further consideration in light of *Arizona* v. *Gant*," Pet. App. 6a, the parties argued whether suppression was warranted, respondent never previously suggested waiver, and the Ninth Circuit resolved the suppression question on its merits.

Law of the case is equally irrelevant. The "doctrine presumes a hearing on the merits," *United States* v. *Hatter*, 532 U.S. 557, 566 (2001), and never "bind[s] this Court in reviewing decisions below." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

The fact that the government did not assert the good-faith exception in another case involving different facts and a different defendant (*Quintana*) cannot give rise to collateral estoppel. There are any number of reasons why the government may not press a particular argument in a specific case, and such a choice will not bind the government in other cases. Collateral estoppel requires the judicial resolution of a disputed issue necessary to a court's judgment in another case. No pertinent determination exists here. In any event, respondent asserts non-mutual collateral estoppel, which never lies against the government. *United States* v. *Mendoza*, 464 U.S. 154, 159-163 (1984).

The government's position as amicus curiae in *Gant* similarly provides respondent no shelter. The question presented in *Gant* concerned only whether, under *Belton*, the vehicle search violated Gant's Fourth Amendment rights. See Pet. at i, *Gant*, *supra* (No. 07-542). As noted, the question of a remedy is entirely distinct, Pet. 15, and neither party in *Gant* raised the good-faith exception to exclusion, either below or in this Court. The government in *Gant* thus conformed its amicus arguments to address only the Fourth Amendment question actually presented.[1]

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[1] The Court normally will not entertain arguments by amici curiae that have not been made by the parties in this Court or below. See, *e.g.*, *Monsanto Co* v. *Spray-Rite Serv Corp*, 465 U.S. 752, 761 n.7 (1984); *UPS, Inc* v. *Mitchell*, 451 U S 56, 60 n.2 (1981)

2. Respondent argues (Opp. 11-15) that no review is warranted because the question presented does not reflect an "enduring legal problem" and affects only a "handful" of cases. Those contentions are incorrect.

a. First, even in the specific context of pre-*Gant Belton* searches, numerous courts have addressed—and will continue to address—whether the good-faith exception applies when police have conducted a search under precedent that *Gant* would later overturn. The conflicting decisions of the federal courts of appeals and state supreme courts that have arisen since *Gant* reflect only an initial wave of appellate cases confronting the question presented. The Ninth Circuit's decision in this case, for instance, was decided promptly after this Court remanded the case to the court of appeals for further consideration in light of *Gant*. See Pet. App. 1a, 6a. Likewise, both *McCane* and *Davis* were already pending on appeal when *Gant* was decided. See *United States* v. *McCane*, 573 F.3d 1037, 1040 (10th Cir. 2009), cert. denied, 130 S. Ct. 1686 (2010); *United States* v. *Davis*, 598 F.3d 1259, 1261 (11th Cir. 2010), petition for cert. pending, No. 09-11328 (filed June 8, 2010). The parties therefore briefed *Gant*'s impact and the good-faith exception for the first time on appeal. Numerous cases raising the question presented have yet to progress as far as *Gonzalez*, *McCane*, and *Davis*. See Pet. 20 (citing illustrative pending cases in state supreme courts and federal courts of appeals).

Respondent asserts (Opp. 11-13) that review is unwarranted because courts in some cases may deny suppression on alternative grounds. That possibility is not a reason to deny review where, as here, numerous federal courts of appeals and state supreme courts have

actually grounded their decisions on a question subject to a division of authority.

The Eighth Circuit, for example, did not reach the government's good-faith arguments in *United States* v. *Salamasina*, ___ F.3d ___, No. 09-2186, 2010 WL 3062007 (Aug. 6, 2010), because it recently held the challenged search to be consistent with *Gant*. Cf. *United States* v. *Shakir*, ___ F.3d ___, No. 09-2665, 2010 WL 3122808 (3d Cir. Aug. 10, 2010) (similar). But that example does not suggest that certiorari is unwarranted. Numerous pending district court cases within the Eighth Circuit involve pre-*Gant Belton* searches dating back at least to 2006.[2] Those cases illustrate that the question presented will continue to arise on appeal—even in the *Gant* context—for a significant period of time.

Since the government filed its petition for a writ of certiorari in this case, the division of authority on the question presented (Pet. 17-19) has deepened. On July 15, the Wisconsin Supreme Court held that evidence

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[2] See, *e.g.*, *United States* v. *Allison*, 637 F. Supp. 2d 657, 669-674 (S.D. Iowa 2009) (holding March 2008 search to be unlawful under *Gant* but applying good-faith exception because the search was conducted "in objectively reasonable reliance upon the Eighth Circuit [precedent]" that *Gant* overruled) (January 2010 conviction is now pending sentencing); *United States* v. *Gray*, No. 4:09-cr-3089, 2009 WL 4739740, at *3-*7 (D. Neb. Dec. 7, 2009) (same for January 2006 search) (June 2010 conviction is pending sentencing); *United States* v. *Tschacher*, No. 4:09-cr-3025, 2010 WL 2696154, at *2 (D. Neb. July 1, 2010) (similar for December 2008 search) (trial scheduled for Sept. 27, 2010), see also, *e.g.*, *United States* v. *Scroggins*, No. 4:09-cr-60, 2010 WL 750057, at *4 & n.2 (W.D. Mo. Feb. 26, 2010) (ruling that November 2008 search could not be justified as a search incident to arrest under *Gant*, but denying suppression based on good-faith-exception and inventory-search rationales) (sentencing scheduled for Sept. 14, 2010).

from a pre-*Gant Belton* search should not be suppressed, even though the search was unlawful under *Gant*, because the good-faith exception applies "where officers conduct a search in objectively reasonable reliance upon clear and settled Wisconsin precedent" that *Gant* later overturned. *State* v. *Dearborn*, ___ N.W.2d ___, No. 2007AP1894-CR, 2010 WL 2773536, at *1 (2010); see *id.* at *7-*10 & nn.11-12 (noting division of authority and disagreeing with Ninth Circuit in this case). Less than two weeks later, the Idaho Supreme Court rejected the analysis adopted by the Ninth Circuit in this case by holding that "retroactivity rules do not preclude application of the good faith exception," which applies where an officer acts in "objectively reasonable" "reli[ance] on case law" that later is overturned. *State* v. *Frederick*, ___ P.3d ___, No. 36493, 2010 WL 2901802, at *6-*8 (July 27, 2010) (citation omitted); see *id.* at *8 (suppressing evidence because the State's factual record failed to show that the search fell "within the purview of the *Belton* rule as it existed at the time of the search").

The question presented is raised in numerous other cases now pending in the high courts of other States. See, *e.g.*, *People* v. *Branner*, 103 Cal. Rptr. 3d 256, 262-268 (Ct. App. 2009) (good-faith exception applies to pre-*Gant Belton* search), review granted, 227 P.3d 342 (Cal. 2010) (No. S179730) (currently in merits briefing);[3] *State* v. *Daniel*, No. 101622 (Kan.) (argued Dec. 8, 2009);[4]

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[3] See also *People* v. *Henry*, 110 Cal. Rptr. 3d 85, 90-97 (Ct. App. 2010) (holding that good-faith exception applies; declaring the Ninth Circuit's contrary reasoning in this case to be "lacking"), review granted, No. S183964, 2010 WL 3276583 (Cal. Aug. 11, 2010).

[4] The *Daniel* argument audio is available at http://www.kscourts.org/kansas-courts/supreme-court/archive/archived-arguments-December-2009.asp. Compare *State* v. *Karson*, ___ P.3d ___, No. 101263, 2010 WL

Briscoe v. *State*, No. 2010-4 (Md.) (oral argument scheduled for Sept. 1, 2010);[5] *State* v. *Hicks*, ___ S.W.3d ___, No. SD30266, 2010 WL 3280092, at *4-*8 (Mo. Ct. App. Aug. 20, 2010) (en banc) (good-faith exception applies to pre-*Gant Belton* search), review pending (Mo. transferred Aug. 20, 2010); see *id.* at *11 (dissenting opinion transferring *Hicks* to Missouri Supreme Court under Mo. Sup. Ct. R. 30.27 and 83.03; citing contrary decision in *State* v. *Johnson*, ___ S.W.3d ___, No. WD70167, 2010 WL 2730593 (July 13, 2010), motion for reh'g pending (Mo. Ct. App. filed July 19, 2010)). And additional cases raising the same question continue to progress towards appellate review in other state high courts. See, *e.g.*, *Valesquez* v. *Commonwealth*, ___ S.W.3d ___, No. 2009-CA-147, 2010 WL 567325, at *3 (Ky. Ct. App. 2010) (rejecting good-faith exception for pre-*Gant* search; explaining that "[t]his important constitutional question is destined to be determined at the highest levels of not only this court system, but the federal court system as well"), motion for review pending, No. 2010-SC-193 (Ky. filed Mar. 22, 2010). Cf. *Brown* v. *State*, 24 So. 3d 671, 680-682 & n.9 (Fla. Ct. App. 2009) (alternative holding that good-faith exception applies to pre-*Gant Belton* search; expressly disagreeing with Ninth Circuit's holding in this case), review denied, No. SC10-104, 2010 WL 2770221 (Fla. June 18, 2010).

The illustrative cases above, which are at the very end of the appellate process, reflect but a subset of the total number of cases in federal and state courts that

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2977223, at *4-*7 (Kan. Ct. App. July 30, 2010) (good-faith exception applies to pre-*Gant Belton* search) (time to seek further review under Kan. Sup. Ct. R. 8.03(a)(1) expires Aug. 30, 2010).

[5] See State Br. at 6-15, *Briscoe*, *supra* (filed Aug. 5, 2010) (not yet available on Westlaw's MD-COA-BRIEF database).

raise the same question. This Court's intervention is warranted to resolve the resulting and deepening conflict of authority.

b. Second, outside the *Gant* context, the question presented concerns a fundamental and enduring question regarding the nature of the good-faith exception that warrants review. Pet. 20. Courts before *Gant* had addressed whether the good-faith exception applies when searches are conducted based on appellate precedents that are overturned after the search. See, *e.g.*, *United States* v. *Jackson*, 825 F.2d 853, 865-866 (5th Cir. 1987) (en banc), cert. denied, 484 U.S. 1011, and 484 U.S. 1019 (1988); *State* v. *Ward*, 604 N.W.2d 517, 526-529 (Wis. 2000); *State* v. *Herrick*, 588 N.W.2d 847, 849-851 (N.D. 1999). Resolution of that good-faith issue depends on broad principles governing when the drastic remedy of suppression is appropriate. Those principles have irreconcilably divided the courts of appeals and state supreme courts, warranting review.

3. Respondent asserts (Opp. 17) that this case is a poor vehicle to decide whether the good-faith exception and qualified immunity incorporate the same standard "in all contexts." But that abstract question is not the question the petition presents: Whether the good-faith exception applies to the search here, which was conducted in objectively reasonable reliance on appellate precedent that *Gant* later overturned. Respondent also suggests (Opp. 17-18) that this Court should await a "case[] raising difficult questions about qualified immunity" and decline review in this case, apparently because there is "a wide body of existing case law" that justified the officers' conduct. Respondent has it exactly backwards. The fact that a "wide body" of appellate jurisprudence made clear that the search was deemed lawful

at the time (as respondent has conceded, Pet. 4) makes this a compelling—not poor—case for review.

Respondent errs in his related assertion (Opp. 23-25) that the petition rests on the view that *Gant* "effectively overruled" *Belton*. What is relevant is that the courts of appeals had long read *Belton*'s bright-line rule to permit searches like that at issue here. See, *e.g.*, Pet. App. 8a. Although *Gant* later held *Belton* to be narrower than that widely understood interpretation, *Gant*'s ruling does not undermine the conclusion that, before *Gant*, an officer's objectively reasonable reliance on then-established appellate precedents triggers the good-faith exception to exclusion.

4. Respondent ultimately contends (Opp. 15-23) that the Ninth Circuit's decision is correct. That contention is wrong and, in any event, provides no reason for denying the review necessary to resolve an entrenched division of authority.

Respondent is incorrect to assert (Opp. 15-16) that *Gant* itself found the good-faith exception inapplicable. The majority and dissenters in *Gant* did not address the good-faith exception to exclusion. They did not even cite to any of the Court's suppression jurisprudence relevant to that question. See Pet. 16-17. The Court simply had no occasion to reach the question of remedy, which was neither pressed by the parties nor passed upon below. And although the dissent stated that the majority's decision could "*cause* the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law," 129 S. Ct. at 1726 (Alito, J., dissenting) (emphasis added), that statement reflects an understandable concern, not a conclusion that *Gant* itself would "require" suppression.

Respondent's reliance on retroactivity jurisprudence (Opp. 18-23) conflates the question whether there was a Fourth Amendment violation with the question whether suppression of evidence is justified as a remedy. Respondent relies in part on cases concerning run-of-the-mill trial errors that do not involve the remedy of suppression. *E.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314 (1987); *Danforth* v. *Minnesota*, 552 U.S. 264 (2008). But the question in this case—"whether the exclusionary rule's remedy is appropriate"—"has long been regarded as an issue *separate* from the question whether the Fourth Amendment" was itself violated. *Illinois* v. *Gates*, 462 U.S. 213, 223 (1983) (emphasis added); Pet. 15 (citing cases). The retroactive application of *Gant* speaks to the latter, not the former.

Respondent invokes (Opp. 18-21) other decisions predating this Court's 1982 creation of the good-faith exception in *Leon*. Those decisions are unavailing. The Court expressly stated in *Leon* that it was "modif[ying]" the exclusionary rule by creating a good-faith exception, which properly aligns the rule with its sole justification: deterrence. 468 U.S. at 900, 905, 913 & n.11, 918-920; see *Herring*, 129 S. Ct. at 700 ("the exclusionary rule * * * applies only where it 'result[s] in appreciable deterrence'") (quoting *Leon*, 468 U.S. at 909). And, since *Leon*, the Court has emphasized that "evidence should be suppressed '*only* if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.'" *Id.* at 701 (emphasis added) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 348-349 (1987)). The Ninth Circuit fundamentally erred in failing to follow those controlling principles. Review is therefore warranted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

AUGUST 2010